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IN THE

# Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA *ET AL.*,
*Petitioners*,

v.

EDMUND G. BROWN, JR. *ET AL.*,
*Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

## BRIEF OF AARP, ASSOCIATION FOR GERONTOLOGY AND HUMAN DEVELOPMENT IN HISTORICALLY BLACK COLLEGES AND UNIVERSITIES, CALIFORNIA ALLIANCE FOR RETIRED AMERICANS, CENTER FOR MEDICARE ADVOCACY, INC., THE GRAY PANTHERS PROJECT FUND, NATIONAL CITIZENS' COALITION FOR NURSING HOME REFORM, OLDER WOMEN'S LEAGUE, AND PARAPROFESSIONAL HEALTHCARE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS


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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are organizations that share an important interest in ensuring that scarce state resources are used to meet the needs of California's most vulnerable residents, including the poor, the elderly, and the disabled. Many of these individuals rely on grant and program funds from state or combined state and federal sources to obtain essential services, particularly those related to health care.

State-funded health-care services are deeply in need of the protection that AB 1889 provides. California is a large state in which nearly seven million people lack health insurance. *See* Carmen DeNavas-Walt et al., *U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2006*, at 24 (2007), *available at* http://www.census.gov/prod/2007pubs/p60-233.pdf.[2] State programs, including Medi-Cal (California's Medicaid program) and Healthy Families (California's version of the State Children's Health Insurance Program) provide an important safety net to millions of low-income Californians who do not have health insurance. The diversion of funds from these programs to activities unrelated to essential services – such as

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Letters reflecting the consent of the parties have been filed with the Clerk.

[2] All Internet sources last visited Feb. 16, 2008.

employer efforts to promote or deter union organizing – places the intended beneficiaries at serious risk of losing much-needed services.[3]

## SUMMARY OF ARGUMENT

Like many governments, California has opted to provide health care and other essential services to otherwise-underserved groups primarily through private entities. The state necessarily has a very close relationship with these private providers, who are the means by which the state is implementing important government programs. In light of this close relationship, the state's interest in how these private providers spend state funds (and, in particular, ensuring that these funds reach their intended beneficiaries) is manifest. This interest is vindicated not only by AB 1889, but also by other state laws and regulations such as those governing the current Medi-Cal reimbursement system. One set of provider costs that California, like Congress before it, has opted not to subsidize is the increasingly high cost of efforts to persuade employees one way or the other concerning union representation (hereinafter "persuader activities"). That choice is especially significant in California, where the state's budget crisis threatens to reduce state funds for programs such as Medi-Cal. It is thus essential that scarce state funds reach their intended beneficiaries, rather than being diverted to finance persuader activities.

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[3] For detailed information on *amici* and their respective interests, see Appendix A.

The NLRA as a whole does not preempt AB 1889. Indeed, a state's choice not to subsidize particular conduct arises out of precisely the kind of deeply rooted local interest that is not subject to preemption, particularly in the absence of a clear preemptive statement from Congress. Nor does Section 8(c) of the NLRA in particular display any congressional intent to prohibit state legislation such as AB 1889. To the contrary, to the extent that Section 8(c) is at all relevant to this case, the protections that it provides to employers merely mirror those available under the First Amendment. And under this Court's well-established jurisprudence, a government's decision not to subsidize the exercise of a particular right does not constitute a violation of that right.

## ARGUMENT

### I. AB 1889 Vindicates The State's Interest In Ensuring That Scarce State Funds Are Not Misused For Expensive Fights Over Unionization.[4]

1. Governments, including California's, often find that the best way to deliver essential services such as health care to their neediest residents is through private, rather than public, entities. In many cases, the relationship between the state and the private providers is an extraordinarily close one: in the case of Medi-Cal, for example, the state's regulation of providers is pervasive, *see,*

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[4] California's Assembly Bill 1889 is codified at Cal. Govt. Code §§ 16645-49.

*e.g.*, *infra* at 30-31 (describing Medi-Cal reporting requirements), and many providers in turn rely on Medi-Cal payments for the overwhelming majority of their funding.[5] Both the level of service the providers must offer and the reimbursements they receive are determined not by negotiations in the marketplace, but by detailed specifications unilaterally set by the state government, and the providers are subject to continuous state oversight through cost-reporting and audit requirements. The state's payments to these providers are therefore not ordinary, arms-length business transactions.[6]

Given its close links to the providers, the State's interest in how grant and program funds are spent is manifest. Without legislation such as AB 1889 in force, the State has legitimate reasons for concern that state funds allocated to these providers may be used to subsidize costly fights over unionization, thereby shortchanging the

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[5] *See, e.g.*, State of California, Office of Statewide Health Planning and Development, Long-Term Care Facility Annual Financial Data (Oct. 2005), *available at* http://www.oshpd.state.ca.us/HID/Products/LTC/AnnFinanclData/SelectedData/data/lafd122004/Lafd1204.zip (data showing that more than 28% of all nursing homes in California depend on Medi-Cal and Medicare for at least 90% of all revenues); J.A. 130-31, 153, 166, 301 (declarations of several petitioners reporting facilities that rely on Medi-Cal payments for 100% of all revenues).

[6] Accordingly, these are not the types of transactions in which the state abandons any interest in or control over its funds following their transfer. *Contra* Br. *Amicus Curiae* of the United States 32-33.

health-care services the state intended to subsidize. All that AB 1889 requires is that providers use non-state funds (including profits if they wish) to support these persuader activities.

2. California's interest in how private service providers spend state funds (and, relatedly, in ensuring that state funds actually reach their intended beneficiaries) is vindicated not only by AB 1889, but also by other state laws and regulations, most notably the recent changes to the state's reimbursement system for nursing homes and other long-term care providers. Until 2005, California paid nursing homes that participated in Medi-Cal a per diem rate, which the state's Department of Health Services calculated using the median costs incurred by comparable facilities. *See Governor Signs Nursing Home Funding Reform*, Sacramento Bus. J., Sept. 30, 2004, *available at* http://sacramento.bizjournals.com/sacramento/stories/2004/09/27/daily29.html. Because it allowed nursing homes to keep any difference between their actual spending and the per diem rate, this model gave nursing homes an incentive to spend as little as possible on patient care. *See* Philip Jacobs & John Rapoport, The Economics of Health and Medical Care 160 (5th ed. 2004) (Under a fixed-rate payment model, "[l]ong-term care facilities . . . might compromise on quality (which would also lower costs and increase profits). As long as long-term care facilities seek profits . . . they will tend to lower costs when such a payment mechanism is in place.").

In 2005, California implemented a new reimbursement system for long-term care facilities that was intended to "improve the quality of life for some of [California's] most vulnerable residents." Governor's Message—Assembly Bill No. 1629 (Sept. 29, 2004). Under the new system, Medi-Cal payments to nursing homes are based on a facility's actual costs in five major categories, each subject to a separate ceiling. *See* Medi-Cal Long-Term Care Reimbursement Act, Cal. Welf. & Inst. Code § 14126 (West 2008). This shift from a fixed per diem rate to reimbursements that match the actual costs of care was intended to encourage facilities to improve patient care by spending more on caregivers and their training. For example, the new system will reimburse facilities for all direct labor costs (such as salaries for direct patient care) up to the ninetieth percentile of the costs reported by comparable facilities.[7] Separately, it will also reimburse facilities for important indirect costs – such as housekeeping services and continued training for the nursing staff – also up to the ninetieth percentile.[8] By reimbursing

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[7] Long-Term Care Reimbursement Rates Update, *Medi-Cal Update: Billing and Policy—Provider Bulletin #343*, § 204(a) (Dep't of Health Care Servs., Oct. 2005), *as amended by* Correction Notice to Provider Bulletin #343, *available at* http://www.dhs.ca.gov/mcs/mcpd/rdb/LTCSDU/pdfs/Correction%20Notice%20to%20Provider%20Bulletin%20LTC%20343.pdf. The statute permits these regulations to be implemented via provider bulletin rather than formal regulatory action until July 2008. Cal. Welf. & Inst. Code § 14126.027(c) (West 2008).

[8] Long-Term Care Reimbursement Rates Update, *supra* note 7, § 204(b). By contrast, the state reimburses nursing

facilities for their actual costs, the new methodology eliminates the incentive for providers to minimize their costs, while the separate ceilings for each of the five cost categories ensure that providers with high costs in one category will not be pressured to cut costs on other essential services.[9] *See generally* Kathy Robertson, *Goal of*

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homes at a lower rate for costs arising from areas for which it wishes to discourage spending, such as administrative costs (reimbursed at "the 50th percentile of the allowable Medi-Cal administrative cost per diem"), *id.* § 206, and the non-labor portion of indirect costs such as housekeeping, *id.* § 205.

[9] Although both Medi-Cal and Medicare have separate provisions specifying that unionization expenses are not to be included on the cost reports that care providers submit for reimbursement, these provisions by themselves have proven inadequate to prevent the use of funds for persuader activities because the prohibited expenditures can easily be contained within other reported costs (particularly when they involve, for example, paying for time spent by supervisors relating to persuader activities). *See, e.g., Congress of California Seniors v. Catholic Healthcare West*, 104 Cal. Rptr. 2d 655 (Cal. Ct. App. 2001) (reporting allegations that employers have included expenses relating to persuader activities in their Medicare cost reports despite federal law providing that these expenses are non-reimbursable). Further, if (as petitioners seem to suggest) many employers were able to spend money on persuader activities before AB 1889 even when they were funded exclusively by Medi-Cal, *see* Pet. Br. 43, this would confirm that employers have found ways to circumvent the traditional exclusion of the costs of persuader activities from Medi-Cal and Medicare reimbursement reports. Past experiences thus demonstrate that AB 1889 is necessary to vindicate the state's interest in ensuring that Medi-Cal funds will be actually spent on their intended beneficiaries.

Relatedly, ensuring that state funds are indeed being spent on their intended beneficiaries is a useful proxy for

*Nursing Homes' New Pay Plan: Better Care*, Sacramento Bus. J., Jan. 20, 2006, *available at* http://sacramento.bizjournals.com/sacramento/stories/2006/01/23/story6.html.

Like AB 1889, these changes in the reimbursement methodology reflect the state's concern for, and ongoing interest in, how its funds are spent. Indeed, that the state regards this interest as significant is underscored by its willingness to commit the substantial amount of time and resources required to measure the costs of providing health-care services and determining which of those costs it will subsidize. *See infra* at 30-31.

3. One set of costs that California has opted not to subsidize is the cost of a provider's persuader activities. Here, AB 1889 mirrors longstanding federal law regarding the use of federal funds to finance persuader activities. Nearly three decades ago, a House Report "strongly encourage[d] federal agencies and other federal and state entities to take actions . . . which clearly and emphatically state that public funds earmarked for a particular use are not to be expended to influence workers about unionization." Subcomm. on Labor-Management

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ensuring quality, because it is otherwise difficult to monitor the quality of services that the state is receiving for its money. Thus, it would not be enough for the state simply to exclude the costs of persuader activities from the reimbursement rates, because, for example, if a nursing home is later found to have diverted funds for persuader activities, the harm to the intended beneficiaries will already have taken place.

Relations of the House Comm. on Educ. & Labor, 96th Cong., *Pressures in Today's Workplace* 41 (Comm. Print 1980) (emphases added).

Even more significantly, Congress enacted legislation specifically designed to ensure that employers do not use government funds to finance persuader activities. For example, the federal Head Start program, Workforce Investment Act, and National Community Service Act all prohibit the use of government program funds "to assist, promote, or deter union organizing." 42 U.S.C. § 9839(e) (amended to include subsection (e) in 1990) (Head Start Program); 29 U.S.C. § 2931(b)(7) (enacted 1998) (Workforce Investment Act); 42 U.S.C. § 12634(b)(1) (enacted 1990) (National and Community Service Act). Not one of these statutes contains any suggestion that Congress intended to alter the NLRA's regulatory scheme. Indeed, Head Start effectively acknowledges that the prohibition on using federal funds to promote or deter union organizing is consistent with the NLRA by noting that "agencies that run Head Start programs . . . are covered by the NLRA and have the same rights and responsibilities in interacting with unions as other employers."[10]

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[10] U.S. Dep't of Health & Human Servs., Admin. for Children & Families, Information Memorandum ACYF-IM-HS-00-11: Head Start and Labor Unions (Mar. 27, 2000), *available at* http://eclkc.ohs.acf.hhs.gov/hslc/Program%20Design%20and%20Management/Head%20Start%20Requirements/IMs/2000/resour_ime_00510a_020906.html; *see also* U.S. Dep't of Health & Human Servs., Admin. for Children & Families, Information Memorandum ACYF-IM-HS-97-14: Head Start Funds and Union Organizing (Nov.

These federal provisions are (as the titles of the relevant provisions of the Workforce Investment Act and the Head Start program suggest, *see* 29 U.S.C. § 2931(b)(7) ("No impact on union organizing"); 42 U.S.C. § 9839(e) ("Neutrality concerning union organizing")) entirely neutral on the question of unionization. Employers who receive federal funds remain free to "assist, promote, or deter union organizing"; Congress simply has opted not to fund such activities. Indeed, the 2000 Head Start Memorandum clarifies that the Administration of Children and Families of the U.S. Department of Health and Human Services – the agency that oversees spending of Head Start funds – is "neutral on the question of whether or not Head Start programs should become unionized," emphasizing that "this is entirely a local decision and grantee agencies and employees may take positions for or against the establishment of a union, as they see fit." Information Memorandum ACYF-IM-HS-00-11: Head Start and Labor Unions, *supra* note 10.

Congress has imposed similar restrictions on the use of Medicare funds. In 1982, it amended the Medicare Act to prohibit the reimbursement of costs related to union organizing. 42 U.S.C. § 1395x(v)(1)(N) ("In determining such reasonable

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19, 1997), *available at* http://eclkc.ohs.acf.hhs.gov/hslc/Program%20Design%20and%20 Management/Head%20Start%20Requirements/IMs/1997/ resour_ime_00813_021706.html (containing nearly identical language).

costs, costs incurred for activities directly related to influencing employees respecting unionization may not be included."). The legislative history that accompanies the bill explains that the amendments were intended to save money "through measures aimed at reducing extraordinary increases in hospital costs" without "harm[ing] beneficiaries by reducing Medicare benefits." Rep. Dan Rostenkowski, Chairman, House Comm. on Ways & Means, Statement Upon Consideration of the Conference Report on H.R. 4961 (Aug. 19, 1982), 1982 U.S.C.C.A.N. 1486, 1487.

California's AB 1889 – using the same language that Congress has employed – vindicates the same interest in ensuring that state funds are not diverted from their intended beneficiaries to finance unionization fights. Thus, while the bill was under consideration by the Assembly, its supporters explained that "[c]urrently recipients of state funds, including those who receive reimbursements or grants and those who engage in service contracts, are permitted to use those state funds to assist, promote or deter union organizing. The use of state funds in this manner is a misuse of taxpayer funds." Assembly Committee on Labor and Employment, *AB 1889 Assembly Bill—Bill Analysis* 5 (Apr. 12, 2000), *available at* http://info.sen.ca.gov/pub/99-00/bill/asm/ab_1851-1900/ab_1889_cfa_20000411_125333_asm_comm.html. And like its federal counterparts, AB 1889 does not prohibit employers from using their own funds in pro- or

anti-union efforts. Instead, like Congress, California has merely opted not to finance such activities.

4. Concerns about the use of state funds to finance persuader activities are not merely hypothetical. As the federal government itself has recognized, the costs of these activities are substantial. Commission on the Future of Worker-Management Relations (Dunlop Commission), Fact Finding Report 74 (May 1994).[11] Some of these costs arise from direct payments to labor attorneys and outside consultants, who may do everything from creating customized persuader literature, videos, and websites to coaching supervisors on how to persuade employees. *See* Kris Maher, *Unions' New Foe: Consultants*, Wall St. J., Aug. 15, 2005, at B-1; John Logan, *The Union Avoidance Industry in the United States*, 44 British J. Ind. Rel. 651, 653-58 (2006); Steven Greenhouse, *How Do You Drive Out a Union? South Carolina Factory Provides a Textbook Case*, N.Y. Times, Dec. 14, 2004, at A1. Although exact statistics are not available, it is estimated that nearly three-quarters of all employers confronted with union organizing campaigns hire outside consultants, incurring direct costs of about $200 million per year. John Logan, *Consultants, Lawyers, and the 'Union-Free'*

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[11] This report by the U.S. Departments of Labor and Commerce presents findings of a commission that held hearings and examined quantitative and qualitative evidence on the state of worker-management relations in the United States.

*Movement in the USA Since the 1970s*, 33 Indus. Rel. J. 197, 198 (2002) (citing John J. Lawler, Unionization and Deunionization (1990)) [hereinafter Logan, *Consultants*].

The true costs of persuader efforts are almost certainly higher, as they include not only these direct payments to outside consultants and attorneys, but also the costs of time spent by management and supervisors meeting with (and being trained by) outside consultants, as well as the time spent by all employees attending mandatory persuasion meetings. *See id.* Indeed, during unionization campaigns more than seventy percent of employees are likely required to attend these so-called "captive audience" speeches. Lawler, *supra, at* 144-45 & tbl.7.2; *see also* Greenhouse, *supra*, at A1 (as part of persuasion effort, "company required employees to listen to speakers saying the union did not want to help workers, but only wanted their dues money"). The total costs of persuader activities have been estimated at as much as one billion dollars per year. *See* Logan, *Consultants*, *supra*.

The high costs of persuader activities have particularly serious consequences in the context of employers who rely in whole or in part on government funding to support their operations. In such instances, the diversion of government funds to persuader activities deprives the intended beneficiaries of the essential services for which the funds were earmarked. In California, for example, the hospital chain Catholic Healthcare West received over $400 million in Medi-Cal

reimbursements in 1998; during the same period, the chain paid a consulting group over $2.6 million to persuade employees concerning unionization. John Logan, *Innovations in State and Local Labor Legislation: Neutrality Laws and Labor Peace Agreements in California*, *in* University of California Institute for Labor and Employment, *The State of California Labor 2003*, at 161 & n.12 (Nov. 1, 2003), *available at* http://repositories.cdlib.org/ile/scl2003/ch05/. Likewise, in a complaint brought under AB 1889 in 2002, the California Nurses Association alleged that the Antelope Valley Health Care District had spent over $1 million in state funds on a persuasion campaign. *Id.* at 174-75.

5. Ensuring that state funds reach their intended beneficiaries is particularly important in light of California's present budget crisis, which threatens to dramatically reduce the amount of state funds available for programs such as Medi-Cal.[12] The budget recently proposed by Governor Arnold Schwarzenegger calls for billions of dollars in spending cuts to reduce the state's projected $14.5 billion budget deficit. *See Governor's Budget Summary 2008-09*, at 9 (2008), *available at* http://www.ebudget.ca.gov/pdf/BudgetSummary/FullBudgetSummary.pdf; *see also* Tom Chorneau & John Wildermuth, *The Governor's*

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[12] Since 2000, California has struggled with large budget shortfalls. *See* California Budget Historical Documents for 2000-2008, *available at* http://www.dof.ca.gov/budget/historical/2008-09/.

*Budget Cuts Nearly Every State Department*, S.F. Chron., Jan. 11, 2008, at A-1.

Under the Governor's proposed budget, programs including Medi-Cal and Healthy Families are at risk of significant cuts. For example, the Governor proposes to reduce state spending for Medi-Cal by $1.126 billion, which would cost the state an additional $1.139 billion in lost federal matching funds.[13] The proposed changes to Medi-Cal include reduced payments to the majority of Medi-Cal providers, mandatory review of Medi-Cal eligibility four times per year, and termination of government payment of Medicare Part B premiums for some beneficiaries enrolled in both Medi-Cal and Medicare. Cal. Budget Project, *supra* note 13, at 3-4. Important services such as home health care and dental and eye care would also be cut. *Id.* Reductions in these services, particularly for chronically ill patients, may force many of these patients into long-term facilities and hospitals, where care is even more expensive. *See Medi-Cal Cuts Will Exacerbate Health Care Crisis in California, Health Care Providers Will Testify*, Medical News Today, Jan. 28, 2008, *available at* http://www.medicalnewstoday.com/articles/95297.php.

The Governor has also proposed to reduce state funding of the Healthy Families program by $41.9 million by, for example, reducing payments to

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[13] *See* Cal. Budget Project, Governor Releases Proposed Budget 2 (Jan. 16, 2008), *available at* http://www.cbp.org/pdfs/2008/080116_govbudget.pdf.

managed care plans that enroll Healthy Families children, placing limits on dental services, increasing some family contributions, and increasing co-payments for non-preventive services. Cal. Budget Project, *supra* note 13, at 4. These cuts – particularly when combined with changes in the federal SCHIP program[14] – will threaten the ability of low-income California families to receive benefits under the Healthy Families program.[15]

Taken together, the proposed cuts in funding for state health-care programs such as Medi-Cal and Healthy Families would have serious repercussions for millions of poor, elderly, and disabled Californians. Therefore, it is crucial that state funds, which are already scarce and which now face the threat of further cuts, be used to

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[14] The federal Centers for Medicare & Medicaid Services recently issued a directive to states that limits states' ability to make more families eligible for the SCHIP program. *See* Letter from Ctrs. for Medicare & Medicaid Servs. to State Health Officials (Aug. 17, 2007), *available at* http://www.cms.hhs.gov/smdl/downloads/SHO081707.pdf.

[15] Other state health care programs facing the prospect of losing funding under the Governor's proposed budget include Development and Regional Centers serving state residents with developmental disabilities; the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program, which is the child health component of Medicaid designed to improve the health of low-income children by financing necessary pediatric services; as well as family health programs, AIDS programs, and alcohol and other drug programs. Cal. Budget Project, *supra* note 13, at 4.

provide these vital services to their intended beneficiaries.

**II. The NLRA Does Not Preempt AB 1889.**

This Court has repeatedly held that the NLRA does not preempt state law unless Congress's intent to do so is clear. *See, e.g., Malone v. White Motor Corp.*, 435 U.S. 497, 504-05 (1978); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (although Congress undoubtedly has the "extraordinary power" to preempt state law under the Supremacy Clause, "[i]t is a power that [the Court] must assume Congress does not exercise lightly," and thus "it is incumbent upon the federal courts to be *certain* of Congress' intent before finding that federal law overrides" state law) (internal quotation marks and citation omitted) (emphasis added).

There is no such clear indication from Congress that it intended to preempt state laws such as AB 1889. To the contrary, a State's control over how to spend its scarce funds is precisely the kind of distinctively local concern that this Court has held to militate against finding preemption. Nor is AB 1889 preempted because of an alleged conflict with Section 8(c) of the NLRA: Section 8(c) does not provide affirmative protections for employer speech outside the context of unfair labor practices. Even if it did provide such protections, however, its text, structure, and legislative history make clear that Congress intended this protection to extend only as far as the First Amendment, upon which AB 1889 does not infringe.

### A. AB 1889 Reflects Interests That Are So "Deeply Rooted In Local Feeling And Responsibility" That They Cannot Be Preempted Except By "Compelling Congressional Direction."

This Court has repeatedly recognized that national labor legislation "leaves much to the states," *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 240 (1959) (quoting *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480 (1955)), and that principles of federalism play an important role in determining the extent to which a national regulatory scheme displaces state power. Thus, it has explained that

> due regard for the presuppositions of our embracing federal system . . . has required us not to find withdrawal from the States of power to regulate where . . . the regulated conduct touch[es] *interests so deeply rooted in local feeling and responsibility* that, in the absence of *compelling congressional direction*, [the Court can] not infer that Congress ha[s] deprived the States of the power to act.

*Garmon*, 359 U.S. at 243-44 (internal citations omitted) (emphasis added). Because AB 1889 serves an important state fiscal interest that is "so deeply rooted in local feeling and responsibility" that a congressional intent to preempt cannot be inferred without an extraordinarily clear statement to that effect, and because there is no such clear statement in this case, AB 1889's regulation of the

use of state funds lies within the powers left open to states by the NLRA.

1. In a line of cases following from *Garmon*, the Court has explained that "inflexible application of the [*Garmon* preemption] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25*, 430 U.S. 290, 302 (1977). In *Linn v. United Plant Guard Workers of America, Local 114*, for example, the Court held that the NLRA did not preempt state courts from hearing defamation suits arising from malicious libel in the context of a labor dispute because of the "overriding state interest in protecting its residents from malicious libels." 383 U.S. 53, 61 (1966) (internal quotation marks omitted). In so holding, this Court emphasized that labor preemption analysis requires "accommodation of the federal interest in uniform regulation of labor relations with the traditional concern and responsibility of the State . . . ." *Id.* at 57.

Similarly, this Court in *Farmer* held that a state-law action brought by a union member alleging intentional infliction of emotional distress was not preempted by the NLRA. 430 U.S. at 304-06. Indeed, it did so notwithstanding what it regarded as the "potential for interference with the federal scheme of regulation" – i.e., that the abusive behavior that formed the basis for the tort

claim related to behavior that gave rise to other claims that were preempted by the NLRA. *Id.* at 304. Ultimately, the Court concluded that the "potential for interference is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens." *Id.*[16]

Like *Linn* and *Farmer*, this case presents a deeply rooted local interest. This Court has long recognized that a state's interest in determining how to spend its scarce funds is a fundamental value underpinning our federal system. Thus, it has explained that

> [t]oday, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the

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[16] Although the question whether a state interest is so deeply rooted as to warrant an exception to the general *Garmon* preemption rule has generally arisen in the context of state-court jurisdiction over common law torts, *see, e.g., Linn*, 383 U.S. 53; *Farmer*, 430 U.S. 290; and *Sears, Roebuck & Co v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), the Court's opinions in those cases expressly contemplated that its reasoning would apply not only to state tort claims, but also to any state regulation wherein the state's interest does not threaten to interfere with the federal regulatory scheme. *See, e.g., Farmer*, 430 U.S. at 302; *id.* at 295-96 ("[B]ecause Congress has refrained from providing specific directions with respect to the scope of pre-empted state regulation [under the NLRA], the Court has been unwilling to declare pre-empted *all local regulation* that touches or concerns in any way the complex interrelationships between employees, employers, and unions . . . ." (internal quotations and citations omitted) (emphasis added)).

> heart of the political process. . . . [O]ther important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State . . . .

*Alden v. Maine*, 527 U.S. 706, 751 (1999). For example, courts are especially reluctant to find that federal actions impinge on state power in "the vital field of financial administration." *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944). A state's control over how it spends its own funds is an equally important concern in the context of avoiding preemption of state legislative actions as it is in protecting states' sovereign immunity from suit, because the same federalism concerns underlie both areas of law.

2. Nor is there any "clear and manifest" expression of Congress's intent to have the NLRA preempt state laws such as AB 1889. It is well settled that the NLRA does not contain an express preemption provision. *Building & Construction Trades Council of the Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 224 (1993). And although the NLRA has been

found to have preemptive effect with regard to some areas of state action, the only indicia of Congress's intent with regard to a statute such as AB 1889 actually weigh in favor of a finding that the state law is *not* preempted. Specifically, and as described in more detail *supra* at 8-11, Congress has enacted at least three analogous federal statutes – employing language virtually identical to that of AB 1889 – that prohibit employers from using federal funds for their persuader activities. To be sure, federal statutes such as these are not subject to preemption, but even their mere existence, particularly when combined with the lack of a clear statement, strongly suggests that Congress did not intend to foreclose states from enacting comparable restrictions on the use of their funds. Congress's enactment of these statutes also demonstrates that the state's interest in ensuring that its funds are spent on their intended beneficiaries rather than on persuader efforts cannot be an interest that "threaten[s] undue interference with the federal regulatory scheme," *Farmer*, 430 U.S. at 302, because Congress itself evidently did not consider its parallel interest to constitute such interference.

**B. AB 1889 Does Not Conflict With NLRA Section 8(c).**

There is no conflict between AB 1889 and Section 8(c) of the NLRA. As this Court has made clear, *Garmon* preemption applies only to state regulation of activity that is actually or arguably protected or prohibited by the NLRA. *See Sears*,

*Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 187-90 (1978) (discussing *Garmon*). Here, the text, structure, and legislative history of the NLRA all demonstrate that Section 8(c) serves only as an evidentiary rule in cases alleging unfair labor practices. And even to the extent that Section 8(c) concerns employer speech rights, it was designed by Congress merely to implement the First Amendment, and AB 1889 is perfectly consistent with this Court's First Amendment jurisprudence.

**1. Section 8(c) Applies Only To Unfair Labor Practices.**

As its title ("Unfair labor practices") suggests, Section 8 of the NLRA, 29 U.S.C. § 158, outlines what constitutes unfair labor practices on the part of both employers and unions. Thus, for example, Section 8(a)(1) provides that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the NLRA, 29 U.S.C. § 157. Section 8(b) similarly provides that "[i]t shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in [Section 7 of the NLRA] . . . or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

Section 8(c) of the NLRA, which follows immediately after the prohibition on unfair labor practices established in Sections 8(a) and 8(b), merely carves out an exception to liability under

those provisions, providing that "[t]he expressing of any views, arguments, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . , if such expression contains no threat of reprisal or force or promise of benefit." The statute certainly does not support the construction that petitioners and their *amici* now advance – namely, that any limits on speech by employers or unions, whether in the unfair labor practice context or not, automatically conflict with (and are thus preempted by) Section 8(c).

The legislative history also supports an interpretation of Section 8(c) that limits it to unfair labor practices. It indicates that Congress's main concern in enacting the provision was to ensure that employers would not be sanctioned by the NLRB merely for exercising their right to express their views. For example, one House Report emphasized that "[a]lthough the old Labor Board protests it does not limit free speech, it is apparent from decisions of the Board itself that what persons say in the exercise of their right of free speech has been used against them." H.R. Rep. No. 80-245, at 8 (1947). Similarly, a Senate Report explained that Section 8(c) "provides . . . that the Board shall not predicate any finding of *unfair labor practice* upon [] statement[s]" protected by the right of free speech. S. Rep. No. 80-105, at 24 (1947) (emphasis added).

Indeed, the NLRB itself has repeatedly recognized that Section 8(c) was intended only to apply to NLRB enforcement proceedings. *See, e.g.*,

*Fiber Industries, Inc.*, 267 N.L.R.B. 840, 841 n.4 (1983) ("We note that it is well settled that Sec. 8(c) applies only to unfair labor practice proceedings."); *Dal-Tex Optical Co., Inc.*, 137 N.L.R.B. 1782, 1787 n.11 (1962) ("Congress specifically limited Section 8(c) to the adversary proceedings involved in unfair labor practice cases . . . .").[17]

**2. To The Extent That Section 8(c) Protects Employers' Speech Rights, It Merely Implements The First Amendment, And AB 1889 Does Not Violate First Amendment Rights.**

Even if Section 8(c) had imported some employer speech rights, there would still be no conflict between Section 8(c) and AB 1889. This Court has long held that "[Section] 8(c) . . . merely implements the First Amendment." *N.L.R.B. v.*

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[17] Although the United States has filed a brief in support of petitioners, it has neither provided an explanation for its sudden departure from the Board's long-standing interpretation of Section 8(c) nor attempted to reconcile these cases with the position it now takes. Thus, this Court must defer to the Board's consistent line of precedent rather than the government's litigating position in this case. *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988) ("We have never applied [deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice."); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference,' than a consistently held agency view." (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

*Gissel Packing Co., Inc.*, 395 U.S. 575, 617 (1969). That interpretation is confirmed by the legislative history: the House Report that accompanied Section 8(c) explained that the provision sought to stop the NLRB from "us[ing] against people what the Constitution says they can say freely," H.R. Rep. No. 80-245, at 33, while its Senate counterpart indicated that the provision was added because "the Constitution guarantees freedom of speech," S. Rep. No. 80-105, at 23 (1947).

In any event, any restrictions that AB 1889 may impose on an employer's speech are entirely consistent with this Court's well-settled First Amendment jurisprudence, which makes clear that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549 (1983). In *Regan*, a nonprofit public-interest group challenged a provision of the Internal Revenue Code that denies tax-exempt status to organizations engaged in lobbying activities, alleging that this provision impermissibly burdened its First Amendment rights. The Court held that the provision did not violate the First Amendment because it did "not deny [the group] the right to receive deductible contributions to support its non-lobbying activity, nor [did] it deny [the group] any independent benefit on account of its intention to lobby." *Id.* at 545. Instead, this Court emphasized, "Congress has merely refused to pay for the lobbying out of public moneys." *Id.*;

*see also Harris v. McRae*, 448 U.S. 297 (1980) (holding that although the government cannot prohibit abortions, neither must it subsidize them); *Maher v. Roe*, 432 U.S. 464, 479 (1977) (same, emphasizing that the Court's "cases uniformly have accorded the States a wider latitude in choosing among competing demands for limited public funds").

Similarly, in this case California has not denied any employer access to state grant or program funds on account of its persuader speech. Nor has it placed any limits on employers' freedom or ability to express their views to their employees with their own funds. Instead, it has simply declined to subsidize employer speech for or against union campaigns with state funds. In this respect, AB 1889 is nearly identical to the provision upheld in *Regan*, and is therefore entirely consistent with the First Amendment.[18]

Indeed, AB 1889 does not impermissibly infringe on even the speech of employers who receive all of their funds from the state and are thus effectively prohibited from either encouraging or discouraging their employees from unionizing. Neither the Constitution nor the NLRA require

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[18] *Amicus* for petitioner Cato Institute's reliance on the holding in *Perry v. Sindermann*, 408 U.S. 593 (1972), that the government cannot deny a benefit on a basis that infringes First Amendment rights "is unavailing . . . because here the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized." *Rust v. Sullivan*, 500 U.S. 173, 196 (1991).

California to provide funds for an employer that cannot afford to lobby its employees using its own funds. "Although [an employer] does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.'" *Regan*, 461 U.S. at 550 (quoting *Harris*, 448 U.S. at 318); *see also id.* at 546 ("We again reject the 'notion that First Amendment rights are somehow not fully realized until they are subsidized by the State.'" (quoting *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring))). Moreover, as this Court emphasized in *Rust v. Sullivan*, every affected entity is free to decline state money and seek nonpublic funds. 500 U.S. 173, 199 n.5 (1991) ("The recipient is in no way compelled to operate a [government-subsidized] project; to avoid the force of the regulations, it can simply decline the subsidy.").

This Court's First Amendment jurisprudence is also instructive with regard to petitioners' protests that AB 1889's segregated funds and enforcement provisions "impose[] serious burdens," *see* Pet. Br. 44-51, as this Court has specifically and repeatedly upheld enforcement mechanisms far more burdensome than those in AB 1889. For example, in *Regan*, this Court held that it was not "unduly burdensome" to require a group that wanted to engage in lobbying activities while maintaining tax-exempt status for funds used on other activities to maintain not only a separate

financial account, but an entire legally separate organization. 461 U.S. at 544 n.6. And in *Rust*, the Court rejected a challenge to a regulation that required recipients of family planning funds who wished to engage in abortion-related activities "to conduct those activities through programs that are separate and independent from the project that receives [government] funds." 500 U.S. at 196.

Significantly, the requirements imposed by the regulation at issue in *Rust* were substantially more burdensome than those imposed by AB 1889: unlike AB 1889, that regulation not only made clear that "[m]ere bookkeeping separation of Title X funds from other monies is not sufficient," but also included a laundry list of other "nonexclusive factors for the Secretary to consider in conducting a case-by-case determination of objective integrity and independence, such as the existence of separate accounting records and separate personnel, and the degree of physical separation of the project from facilities for prohibited activities." 500 U.S. at 180-81 (internal quotation marks omitted). And in *FCC v. League of Women Voters of California*, the Court indicated that a law which bars recipients of federal funds from engaging in editorializing but allows them to "establish 'affiliate' organizations which could then use the [recipient's] facilities to editorialize with

nonfederal funds . . . would plainly be valid." 468 U.S. 364, 400 (1984).[19]

The complaints from petitioners and *amici* regarding the alleged bookkeeping burdens created by AB 1889 ring particularly hollow insofar as they pertain to Medi-Cal providers, which have long been required to report detailed and comprehensive data on all of their revenues, services, and expenditures. Given these comprehensive standard reporting requirements, the additional reporting required to comply with AB 1889 is minimal.

For instance, hospitals receiving Medi-Cal funds must provide detailed records on *all* of their operations, not just those funded by Medi-Cal.[20]

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[19] The statute that was actually struck down in *League of Women Voters* was far more burdensome. 468 U.S. 364. At issue in *League of Women Voters* was a statute prohibiting any noncommercial educational broadcasting station that received a grant from the Corporation for Public Broadcasting from engaging in editorializing. This Court held that the statute – under which no degree of separation (of funds or otherwise) would be sufficient to overcome the ban – was invalid because it "directly prohibit[ed] the broadcaster from speaking out on public issues." *Id.* at 385. By contrast, AB 1889 creates no such prohibition. Employers may not use state funds to support persuader activity, but they are neither prevented from nor penalized for using their own funds to speak out however they please.

[20] *See* Office of Statewide Health Planning and Development, Healthcare Information Division, Hospital Annual Disclosure Report Forms, *available at* http://www.oshpd.ca.gov/HID/Products/Hospitals/AnnFinanData/forms/index.html [hereinafter Annual Report Form]; Office of Statewide Health Planning and Development, *Healthcare Information Division, Accounting &*

They must report all patient revenue, including those from private funds, broken down into thirty-eight different revenue subclassifications. *See* Annual Report Form, *supra* note 20, at 12. They must list all supplemental operating revenue they receive and indicate the sources of these funds. *See id.* at 14. Hospitals must track, calculate, and report detailed operating data, such as "the average hourly rate of pay to the second decimal for each natural classification of salary and wage expense," *Reporting Manual*, *supra* note 20, § 7020.6. Operating data must also be also broken down into thirty-eight separate task categories, *see* Annual Report Form at 21-22.1. All expenditures must also be reported in an extensive cost allocation matrix that requires over 4000 separate entries. *See id.* at 20. This comprehensive annual reporting form – which must be completed by each hospital receiving Medi-Cal funds – spans over two hundred pages (not including the instruction manuals, which fill hundreds of pages more).

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*Reporting Manual for California Hospitals* (2d ed. 2003) [hereinafter *Reporting Manual*].

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals below should be affirmed.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

**AARP** is a nonpartisan, nonprofit organization with nearly forty million members dedicated to serving persons fifty years of age and older. AARP believes that all Americans should have access to affordable health care, including prescription drugs. Skyrocketing health costs, however, jeopardize the financial and physical well being of millions of Americans. For example, twenty-three percent of Americans have problems paying medical bills, and millions go bankrupt every year because of medical costs; twenty-nine percent of Americans say they skipped treatment, tests, or prescriptions because of costs; and, forty-six million Americans are uninsured. Thus, AARP advocates for the health and economic security of all Americans, and in particular for vulnerable people of all ages, including low-income persons and persons with disabilities. To that end, AARP supports efforts at the state and national level to ensure that these individuals have continuous access to quality health care through publicly administered health insurance programs, including Medicaid. AARP encourages states to exercise available options for expanding Medicaid eligibility and services, and to ensure the highest level of Medicaid participation among all health care providers.

The **Association for Gerontology and Human Development in Historically Black Colleges and Universities (AGHDHBCU)** is a national organization that serves to help develop and

strengthen gerontology programs among historically black colleges and universities to benefit their faculty, staff, students and the communities they serve. AGHDHBCU is committed to public policies that protect the delivery of essential government funded services for all Americans with the greatest social and economic needs. AGHDHBCU is concerned about government contractors' diversion of funds intended for this vulnerable population. AGHDHBCU supports AB 1889 as a needed effort by the state of California to maintain accountability and ensure proper use of scarce public funds.

**California Alliance for Retired Americans (CARA)** is a statewide senior advocacy organization working to improve the quality of life for seniors and their families in California. CARA represents over 800,000 seniors through our 150 affiliated organizations, and are the state chapter of the national Alliance for Retired Americans. CARA is committed to public policies that protect the delivery of essential government-funded services to the most vulnerable segments of the population. CARA is concerned about government contractors' diversion of funds intended for the provision of desperately needed services, and supports AB 1889 as a reasonable and appropriate effort by the State of California to maintain accountability and ensure the proper use of scarce public funds. CARA worked hard in support of AB 1889 in California, as did many of its affiliated organizations.

The **Center for Medicare Advocacy, Inc.** is a national, private, non-profit organization, founded in 1986, that provides education, analytical research, advocacy, and legal assistance to help elders and people with disabilities obtain necessary health care. The Center focuses on the needs of Medicare beneficiaries, people with chronic conditions, and those in need of long-term care. The Center provides training regarding Medicare and healthcare rights throughout the country and serves as legal counsel in litigation of importance to Medicare beneficiaries nationwide. The Center for Medicare Advocacy, Inc. supports public policies that promote appropriate use of public healthcare funding for healthcare services for patients. The Center for Medicare Advocacy, Inc. is concerned about government contractors' diversion of funds from healthcare services to other, non-healthcare purposes and supports AB 1889 as a reasonable and appropriate effort by the State of California to maintain accountability for public funds and ensure the proper use of public healthcare dollars.

The mission of the **Gray Panthers Project Fund (Gray Panthers)** is to bring together young and old, women and men of all backgrounds to achieve social and economic justice and peace. Gray Panthers strives to create a society that puts the needs of people over profits, responsibility over power and democracy over institutions. Gray Panthers is committed to public policies that protect the delivery of essential government-

funded services to the most vulnerable segments of the population, thus supporting the Gray Panthers's vision of putting responsibility over power. Gray Panthers is concerned about government contractors' diversion of funds intended for the provision of desperately needed services, and as such supports AB 1889 as a reasonable and appropriate effort by the State of California to maintain accountability and ensure the proper use of scarce public funds.

The **National Citizens' Coalition for Nursing Home Reform** (**NCCNHR**: The National Consumer Voice for Quality Long-Term Care) is a national organization of individuals and community groups that advocates for quality for people with long-term care needs, with a particular focus on ensuring adequate staffing and raising other standards related to the provision of care. NCCNHR is committed to public policies that protect the delivery of essential government-funded services to the most vulnerable segments of the population and supports efforts to maintain accountability and ensure the proper use of scarce public funds.

The **Older Women's League (OWL)** is the only national grassroots membership organization to focus solely on issues unique to women as they age. OWL strives to improve the status and quality of life for midlife and older women. OWL is a non-profit, non-partisan organization that accomplishes its work through research, education, and advocacy activities conducted through a nationwide chapter network. OWL is

committed to public policies that help women access affordable health care coverage. Additionally, OWL strives to protect the delivery of essential government-funded programs and services that help women achieve better health outcomes and financial security in retirement. OWL believes that state resources should be used to meet the needs of California's most vulnerable residents, many of whom are women. As such, resources should not be diverted from these programs to pay for activities unrelated to essential services.

**Paraprofessional Healthcare Institute (PHI)** is a national nonprofit that works to improve the lives of people who need home and residential care by improving the lives of the workers who provide that care. Our workplace and policy expertise helps consumers, workers and employers improve long-term care by creating quality direct-care jobs. PHI's goal is to ensure caring, stable relationships between consumers and workers, so that both may live with dignity, respect, and independence. PHI supports AB 1889 as a necessary mechanism for the State of California to maintain accountability and ensure that public funds are targeted toward the provision of high-quality care.